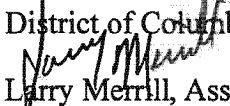


UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

December 28, 2010

**SUBJECT:** Endangered Species Act Section 7(d) Determination for  
the 2010 Water Quality Standards Approvals for the  
District of Columbia, Maryland, and Virginia

**FROM:**   
Larry Merrill, Associate Director  
Office of Standards Assessment and TMDLs (3WP30)

**TO:** Jon M. Capacasa, Director  
Water Protection Division

Section 7(a)(2) of the Endangered Species Act (ESA) requires federal agencies, in consultation with the Services, to ensure that their actions are not likely to jeopardize the existence of federally listed species or result in the adverse modification of designated critical habitat of such species. Upon initiation of consultation, section 7(d) of the ESA prohibits irreversible or irretrievable commitments of resources that have the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives needed to comply with section 7(a)(2) of the ESA.

This memorandum documents my determination that EPA's decision to approve under Section 303(c) of the Clean Water Act (CWA) the 2010 Water Quality Standards (WQS) submittals for the District of Columbia, Maryland, and Virginia subject to completion of an Endangered Species Act (ESA) consultation with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NOAA Fisheries) is consistent with Section 7(d) of the ESA. I request that you concur with this determination.

This memorandum addresses a number of WQS actions, several biological evaluations and informal consultations. The District of Columbia, Maryland and Virginia revised their WQS to reflect numerous addenda to EPA's 2003 Chesapeake Bay ambient water quality criteria, but the District of Columbia and Maryland also made other, non-bay related modifications. To clarify, EPA has prepared biological evaluations to address the non-Bay related revisions, one for the District and one for Maryland. These evaluations, which address both species under the jurisdiction of FWS and species under the jurisdiction of NOAA Fisheries, have been provided to both FWS and NOAA Fisheries.

In addition, EPA also prepared a separate addendum to EPA's 2003 biological evaluation dated November 3, 2010 regarding the modification of the water quality standards by the District, Maryland and Virginia specific to the Chesapeake Bay and the impact on shortnose sturgeon. (Bay BE Addendum). The jurisdictions Bay-specific WQS were based on EPA's 2003 Chesapeake Bay ambient water quality criteria as amended, the subject of previous consultation and issuance of a Final Biological Opinion by NOAA Fisheries in 2004. NOAA Fisheries identified that the shortnose sturgeon was the primary listed species of concern for the Bay tidal waters. EPA's 2010 biological evaluation addendum concluded that certain modifications by the respective states to 2003 Chesapeake Bay criteria will have no effect, and certain modifications may affect, but are not likely to adversely affect, shortnose sturgeon in the Bay. For the TMDL, the BE concluded that the TMDL would have a beneficial effect or no effect on the sturgeon.

EPA's Bay BE addendum also addressed EPA's action to establish a total maximum daily load for the Chesapeake Bay that is covered by a separate memo to you regarding ESA compliance. See 2010 Bay BE Addendum. As the protection of shortnose sturgeon and other tidal Bay aquatic species are under the jurisdiction of NOAA Fisheries, that addendum was provided only to NOAA Fisheries on November 3, 2010.

The District of Columbia submitted its 2010 WQS amendments on October 20, 2010, which contained both Chesapeake Bay related updates and other WQS revisions. EPA prepared a biological evaluation dated March 9, 2010 on the new and revised provisions of the District's WQS as contained in the draft WQS submittal for non-Bay related modifications. EPA analysis of the Bay related modifications are contained in the Bay BE Addendum. Based on the analysis therein, EPA made a finding that our approval will in some instances have no effect, or in other instances may affect, but is not likely to adversely affect, threatened and endangered species in the District. See DC WQS BE and Bay BE Addendum. The Chesapeake Bay Field Office of the Fish and Wildlife Service (FWS) concurred with the DC BE determination on October 15, 2010. Although EPA and NOAA have made significant progress, NOAA Fisheries has not yet concurred with either the DC BE, or the Bay BE Addendum determinations. NOAA Fisheries is in the process of revising and reissuing the Biological Opinion issued in 2004 regarding the Ambient Water Quality Criteria for Dissolved Oxygen, Water Clarity and Chlorophyll a for the Chesapeake Bay and Tidal Tributaries (Bay BO).

Maryland submitted its 2010 WQS amendments on November 19, 2010, which contained both Chesapeake Bay related updates and other WQS revisions. EPA prepared a biological evaluation dated November 2, 2010 (MD BE) on the new and revised provisions of Maryland's WQS as contained in the draft WQS submittal for non-Bay modifications. EPA analysis of the Bay-related modifications is contained in the Bay BE Addendum. Based on the analyses therein, EPA made a finding that our approval of the WQS will have in some instances no effect, or in other instances may affect, but is not likely to adversely affect, threatened and endangered species in Maryland. See MD BE and Bay BE Addendum. The Chesapeake Bay Field Office of the FWS has not yet concurred with the MD BE determination. Although EPA and NOAA have made significant progress, NOAA Fisheries has not yet concurred with either the MD BE, or the shortnose sturgeon evaluation. Regarding the sturgeon, NOAA Fisheries is in the process of revising and reissuing the Bay BO.

Virginia submitted its 2010 WQS amendment on December 23, 2010. This submittal contained only modifications of tidal Bay waters and tributaries consistent with the 2007, 2008, and 2010 Chesapeake Bay Technical Support for Criteria Assessment Protocols Addenda. As all revisions were Chesapeake Bay related, any EPA action is covered under the November 3, 2010 biological evaluation. Although EPA and NOAA have made significant progress, NOAA Fisheries has not concurred with this evaluation, or the shortnose sturgeon evaluation. Regarding the sturgeon, NOAA Fisheries is in the process of revising and reissuing the Bay BO.

EPA's DC BE, MD BE and Bay Addendum BE describe in detail which of the jurisdictions' modifications will have no effect, which are getting more stringent (providing more suitable habitat for the sturgeon) and which criteria are getting less stringent. For those criteria having no effect, EPA finds that the adoption will not affect the species of concern. For those criteria providing more stringent protection or where it will provide more suitable habitat or better food sources (e.g., VA numeric chlorophyll a criteria for the James), EPA finds that such increased protection will only benefit the species. For criteria changes that are getting less stringent, EPA makes detailed findings in the Bay BE Addendum as to why EPA believes there will be "no

impacts of concern” pending completion of consultation, based on EPA analysis, preliminary feedback from discussions with NOAA Fisheries NMFS and for Bay criteria modifications, the establishment of the Bay TMDL, which should guide and accelerate the restoration of the aquatic life uses of the Bay, directly improving the impact on listed species. See Bay BE Addendum.

Furthermore, EPA’s discussions with NOAA Fisheries have led us to conclude that we expect concurrence with our determination regarding the Bay related modifications as well as the non-Bay related modifications. Since August 2010, EPA has had regular discussions with NOAA Fisheries and given them significant amounts of information related to both the Bay TMDL and related WQS modifications. EPA has recently responded on December 24, 2010 to the latest request from NOAA Fisheries with updated information on current water dissolved oxygen conditions, EPA proposed description of the incidental take statement, and EPA’s proposal for reporting requirements to be established once the NOAA Fisheries BO is revised. We expect the NOAA Fisheries to conclude its analysis shortly and issue the revised BO, but this will occur after the approval of the WQS and establishment of the Chesapeake Bay Total Maximum Daily Load. EPA will continue its discussions with NOAA Fisheries until a satisfactory conclusion is reached, and expects to conclude consultation within sixty (60) days.

For the consultations with FWS, EPA has already completed informal consultation on October 15, 2010 as described above regarding DC WQS modifications. For Maryland, the only other non-Bay related WQS modifications, EPA has not yet completed consultation but based on ongoing discussions expects to conclude informal consultation within sixty days.

By approving the WQS submissions “subject to completion of consultation under section 7(a)(2) of the Endangered Species Act,” EPA has explicitly stated that it retains the discretion to take appropriate action if the consultation identifies deficiencies in the standards requiring remedial action by EPA. EPA retains the full range of options available under section 303(c) for ensuring water quality standards are environmentally protective. EPA can, for example, work with the applicable state to ensure that the state revises its standards as needed to ensure listed species’ protection, initiate rulemaking under section 303(c)(4)(B) of the Clean Water Act (CWA) to promulgate federal standards to supersede the state’s standards or, in appropriate circumstances, change EPA’s approval to a disapproval.

I recommend that EPA approve these WQS submissions before completion of ESA consultation with FWS and NOAA Fisheries regarding these submissions. Pursuant to Section 7(d) of the ESA, this action would not constitute an irreversible or irretrievable commitment of resources that has the effect of foreclosing the formulation, or implementation, of reasonable and prudent alternatives needed to comply with Section 7(a)(2) of the ESA.

Therefore, for the reasons provided above, I recommend that you concur with this Section 7(d) determination.

\_\_\_\_\_ I DO NOT CONCUR WITH SECTION 7(d) DETERMINATION

✓  
\_\_\_\_\_ I CONCUR WITH SECTION 7(d) DETERMINATION

12/28/2010  
DATE

  
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JON M. CAPACASA, DIRECTOR  
WATER PROTECTION DIVISION